not participate in collective bargaining and have no individual members who can subject them to the pressure of the ballot, for their only members are unions.[15] The position of the federation is not markedly different from that of a trade association made up of individual employers. Like the latter, it seeks to coördinate policy, provide encouragement, and perform certain staff functions such as research and publicity. Like the latter, it can hardly be described as a participant in or as in control of the collective bargaining process. This view is strongly supported by the Board's conclusion, drawn from the writings of labor economists, that the phrase in question has a distinct technical meaning which does not include federations. As one writer describes it, the national or international unions "are powerful, sovereign bodies, creating locals by charter at will, and revoking them likewise, reserving the power to suspend or otherwise discipline locals, calling strikes, and bargaining. *They are the independent groups of which the American Federation of Labor is but a confederation or alliance.*"[16] [Emphasis supplied.]

The definition of labor organization, which is the same in the new as in the old Act, reflects this concern with col-

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[15] The objectives of the American Federation of Labor, as stated in Article II of its Constitution, are primarily:

"Sec. 2. The establishment of National and International Trade Unions, based upon a strict recognition of the autonomy of each trade, and the promotion and advancement of such bodies.

* * * * *

"Sec. 4. An American Federation of all National and International Trade Unions, to aid and assist each other; to aid and encourage the sale of union label goods, and to secure legislation in the interest of the working people, and influence public opinion, by peaceful and legal methods, in favor of organized labor."

But see note 5, *supra.*

[16] Taylor, *Labor Problems and Labor Law* 269-270 (1950). "The national unions are not members of the AFL or CIO in the sense that Minnesota is a part of the United States. Their position is similar to that of individual countries within the United Nations. The AFL or CIO executive council corresponds roughly to the United Nations Security Council. Each major union has a veto power and can prevent any action adverse to its interests. It is a serious problem for the labor federations, as it is for the United Nations to find useful activities which will not break up the organization by causing internal strife among the members." Reynolds, *Labor Economics and Labor Relations* 143 (1949). See also Peterson, *American Labor Unions* 41-42 (1945).

lective bargaining and the organizations involved therein. It reads:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. [29 U. S. C. A. § 152(5)]

As we have already indicated, employees do not participate in the federation, its only members being unions. Nor does the federation deal "with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." All such functions are performed by the national or international unions and their locals, except in the rare instances when the federation itself is functionally classed as a national or international.[17]

Two other factors tend to support our view that federations are not within 9(h). First, the House bill which was the forerunner of 9(h) forbade certification of any labor organization as a collective bargaining representative "if one or more of its national or international officers" were Communists.[18] The words italicized by us would seem to indicate that the bill was aimed at the local union and at "its national or international officers"—not at the federation of which a national or international union is a virtually autonomous part.[19] This language remained in the

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[17] See note 5, *supra*.

[18] Section 9(f)(6) of H. R. 3020, 80th Cong., 1st Sess., read, in pertinent part, "No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party * * *." 1 *Legislative History of the Labor Management Relations Act, 1947*, p. 63 (1948).

[19] House Report No. 245 on H. R. 3020 refers to the fact that "At least *11 great national unions* and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions." *Id.* at 329. [Emphasis supplied.] There are only *two* federations of importance, the A. F. L. and C. I. O.

bill as it first passed both House and Senate[20] and was changed to its present form only when the non-Communist requirement was recast so as to provide for affidavits. It does not appear that any change in meaning was intended by the substitution of "such national or international labor organization" for "its national or international officers." Second, in his veto message, the President said, "The mere refusal by a single individual to sign the required affidavit would prevent an *entire national labor union* from being certified * * *. *The union and the affected industry* would be disrupted for perhaps a long period of time * * *."[21] It seems to us that, had it been thought that 9(h) required federation officers to file, the President would undoubtedly have pointed out the calamitous effect on the entire economy of non-compliance by a single federation officer. Not one but many industries and many "national labor unions" would then be affected by his failure to file.[22]

All that we have said thus far reveals that Congress, the President and the Supreme Court apparently considered "national or international labor organization" to mean those organizations which directly perform the collective bargaining functions described in § 2(5).[23]

Petitioner argues that, even if it be conceded that the phrase "national or international labor *union*" does not include a federation, nevertheless Congress used a broader term—"national or international labor *organization*," and that such term includes a federation. Absent any support for such an assertion in the legislative history, we cannot agree. It seems more reasonable to us that "organization" was used instead of "union" merely because not all bodies popularly known as unions are such by name. They

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[20] *Id.* at 190, 250.

[21] *Id.* at 921. (Emphasis supplied.)

[22] The effect of non-compliance on the part of a single federation officer was stated by the Board to have been a factor in the congressional intent not to include federation officers within 9(h). *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. at 15.

[23] 29 U. S. C. A. § 152(5).

are variously labelled union, brotherhood, association, guild, alliance, board, plan, etc.

One other argument is pressed upon us. It is said that, since both § 9(h) and § 304[24] refer to "labor organizations"[25] and the Supreme Court has held that the C. I. O. is drawn within § 304, it follows that the A. F. L. is a "labor organization" within § 9(h). But the decision cited to us[26] contains neither holding, express or implied, nor discussion to the effect that the C. I. O. is a "labor organization" within § 304. The case was disposed of on grounds which made it unnecessary to consider that question.[27] Although we do not now concern ourselves with the construction of § 304, we recognize that the same words often do not mean the same thing in different contexts. A clear legislative history might require that federations, though not within 9(h), be included within § 304. So also, the fact that the policy and function of § 304 differ from that of 9(h) may require that it be given a different construction. Section 304, unlike the rest of the Labor Management Relations Act, is not keyed to collective bargaining but to political campaign contributions. It amends the Corrupt Practices Act rather than the National Labor Relations Act. It may be that the federation's status is not divisible in the performance of this political function, as it is with respect to the collective bargaining process around which 9(h) revolves; that the political activities of the federation on behalf of the locals and organizing committees directly chartered and supervised by it[28] cannot be separated from similar activities on behalf of its national and international member unions.

We are aware that our construction of 9(h) is in conflict with that of the Fifth Circuit in *National Labor Re-*

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[24] Section 304 is now part of 50 U. S. C. A. App. § 1509, which provides in pertinent part: "For the purposes of this section 'labor organization' shall have the same meaning as under the National Labor Relations Act [Title 29, § § 151-166]."

[25] Quoted on p. 5, *supra.*

[26] See *United States v. C. I. O.*, 335 U. S. 106 (1948).

[27] *Id.* at 110.

[28] See note 5, *supra.*

lations Board v. Postex Cotton Mills, No. 12888 (5 Cir., May 5, 1950).

II

Petitioner contends that, even if the federation officers were not required to file, it was entitled to rely on the General Counsel's unofficial intrepretation that such officers did have to file and, therefore, was justified in refusing to bargain with the locals. Aside from the fact that estoppel may not be invoked against the Government[29] and hence does not prevent the Board from overruling its General Counsel, we think there is another ground for decision on this point, although the Board does not rely upon it. Even if it were true that federation officers were required to file and had failed to do so, petitioner could not for that reason alone refuse to bargain. The failure of union officers to comply with 9(h) does not in any way relieve an employer of the paramount obligation to bargain collectively in good faith. The Act's only sanction for non-compliance is denial of Board facilities. Thus, if an unfair labor practice is committed by an employer, the union may not seek Board aid to compel him to cease and desist

> unless there is on file with the Board an affidavit executed *contemporaneously or within the preceding twelve-month period*[30]

by the officers covered. Since this language specifically contemplates that the requisite affidavits may be filed "*contemporaneously*" with invocation of Board facilities, the unfair practice against which they are invoked obviously must have occurred earlier. It is thus the Board which refuses its processes to the non-complying union, not the employer. We do not think an employer may take the matter into his own hands and refuse to bargain with a union because its officers have not filed. If he does so, the ability of the union to successfully invoke Board processes thereafter, so long as its officers file beforehand, may result in his being cited for an unfair labor practice.

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[29] *United States v. San Francisco*, 310 U. S. 16, 31-32 (1940).

[30] 29 U. S. C. A. § 159(h), quoted in full, *supra*, p. 2. [Emphasis supplied.]

Unlike the phrase "national or international labor organization," we think the language of the statute is clear on this point. It is neither ambiguous nor a term of art depending upon technical sources for its meaning. We disagree with the contrary position taken by the Board in *Matter of Andrews.*[31]

III

The Company seeks to argue that, even assuming federation officers were not required to file, it was under no obligation to bargain with the Union on September 19, 1947, because the Union did not represent a majority of the employees at that time. That point was not argued before the Board and cannot be raised for the first time here.[32] It is true that petitioner took exception to the Trial Examiner's finding of fact

> * * * that on September 19, and November 8, 1947, and at all times thereafter the Union represented a majority of the employees in the appropriate unit, and was still the statutory bargaining agent for the employees therein.

But such exception was taken

> for the reasons more fully set forth in Respondent's Brief under B. P.-1-2-3-5-6-7, 9.

None of the "reasons" thus incorporated by reference dealt with the question of majority status on September 19. Whatever reference was made to majority status was to the situation on November 8.

IV

Since petitioner committed an unfair labor practice by failing to bargain with the Union on September 19, 1947, any loss of majority subsequent to that date is attributable to the illegal refusal to bargain. Petitioner may not rely upon a loss of majority attributable to an unfair labor

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[31] 87 N. L. R. B. No. 62.

[32] 29 U. S. C. A. § 160(e); *National Labor Relations Board v. Cheney California Lumber Co.*, 327 U. S. 385, 388-389 (1946).

practice as a defense for his refusal to bargain on November 8, 1947.[33]

The order of the Board is affirmed and will be enforced. So ordered.

WILBUR K. MILLER, Circuit Judge, *dissents.*

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[33] *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 704-705 (1944); *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 687 (1944); *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, 513 (1942).

APPENDIX 3

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 12,888

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

POSTEX COTTON MILLS, INC.,
Respondent.

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

(May 5, 1950.)

Before HOLMES, WALLER, and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge: The respondent urges the point, presented by motion to dismiss before the trial examiner, and presented and re-urged before the National Labor Relations Board and in this Court, that the Board was forbidden by the statute[1] to complain of the charge

[1] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under subsection (e) (1) of this section shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or with-

(Footnote 1 continued on next page.)

made by the Textile Workers Union of America, C. I. O., that respondent refused to bargain with it. The question, as well stated in the Board's brief is: "Whether the Board is authorized to issue a complaint upon a charge filed by an international (union) affiliated with the Congress of Industrial Organizations if the officers of the international have filed the non-communist affidavit provided for in section 9(h) of the Act, but the officers of the C. I. O. have not."

No question of the constitutionality of the statutory requirement is raised. We therefore do not consider Congressional power, but only the proper construction of the statutory language. There is no dispute between the parties as to Congressional purpose. It is conceded that the evil of Communist influence upon labor organizations was sought to be remedied by denying the benefits provided by the Act, and especially collective bargaining, to unions having Communist officers. That Congress was properly concerned over the seriousness of industrial strife and disunity threatened and which would result from politically motivated strikes of Communist-led unions may not be doubted. In our efforts to give effect to Congressional purpose, we should not overlook what we consider the amply justified and validly sustained view of substantially the entire membership of the Congress (as is likewise true of all loyal Americans generally), that since Communist idealogy has been shown so flagrantly incompatible with the principles of American democracy that both can not coexist in any one system of government, its destructive influence in all phases of government should properly be removed if lawful means be available.

(Footnote 1 continued from preceding page.)

in the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect of such affidavits." Sec. 9(h), Labor Management Relations Act, 61 Stat. 146, 29 U. S. C. A. Sec. 159(h).

The charge in the present case was made by the Textile Workers Union whose officers had filed the necessary affidavits. At the hearing it was stipulated, "that the Congress of Industrial Organization is a labor organization," and that its President had not filed the affidavit required by No. 9(h), *supra*. It being established for the record, as is also a matter of general knowledge, that the Congress of Industrial Organizations is a labor organization, the question remaining to be settled, is whether it is likewise "any national or international labor organization" within the terms of the statute.

The Board contends that consideration of the well established meaning in labor relations parlance of the words "national or international labor organization" as not including the present federations, and of the autonomous, independent nature of the national and international unions, by which the parent organization is only a federation or alliance, with resultant lack of control by the federations over its affiliates, and that the federation does not generally directly bargain with employers, and of the legislative history of the Act, establishes that Congress did not intend to, nor bring the C. I. O. within the requirements of the noncommunist provision. It further contends that its construction of the statute fully effectuates the Congressional intent to prevent Communist-led unions from subverting the statutory policy of encouraging collective bargaining, and the contrary construction tends to frustrate that purpose, since, as urged, if the failure of one officer of the C. I. O. to file the affidavit barred each of its affiliates or constituent units from invoking the jurisdiction of the Board there would be no incentive for such affiliate to purge its own ranks. The Board (with one member concurring for distinct reasons, and another dissenting), held, as to the American Federation of Labor, that it was not within the terms of the statute where the national union affiliated with it seeking relief, was in compliance. *North Virginia Broadcasters*, 75 N. L. R. B., 11. We recognize the Board's opportunity of familiarity with the usual meaning of terms employed in labor relations parlance, but we do not approve its construction of

the provisions of the legislative enactment. We think the language of the statute, considered in the light of Congressional purpose, the evil to be remedied, and the means provided to effectuate that purpose, evidences Congressional intent to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.

The force of the Board's argument that national and international unions are generally considered to have a status different from the parent organizations, sought to be supported by quotations from recognized authorities in the field of labor economics, is considerably weakened by the observation that these writers refer to the relationship of national and international *unions* to the American Federation of Labor or the Congress of Industrial Organizations, not to national or international *organizations*, as does the statute. Nor do we think the question of the relative strength or contrasting power of the union and the parent organization controlling. [If the position of the union desiring the benefit of the Act is strong, it can with other affiliates exercise control over the parent; if weak, the parent can exercise control over it.] Thus in either event, effectuation of the Congressional purpose to eradicate Communist leadership is not thwarted, but promoted, in requiring compliance by each. But if extent of control be material, we are cited by the Board to instances where strong national and international unions withdrew from their parent organizations and presently function successfully independently of the federations. Congress was doubtless aware of these instances and may well have been of the opinion that in view of the desire of any federation to grow in members and power, the realities of the situation would require the parent to bring itself into compliance rather than lose its strong affiliates. It is said that the leaders of the two major organizations are determined to rid their organizations of Communist influences. We make no inquiry of and are not legally concerned with the purpose of the officers of the two major federations in declining to file the required

affidavits. However, if the statute had been enforced as we here hold proper, and one had complied and another had not, we doubt not there would have resulted such acquisition of new affiliates by the complying organization as would have proven the validity of the means adopted by Congress to remove Communist influence from the American labor movement. [Furthermore, without regard to relative power, the parents themselves in instances so numerous as to be substantial, directly charter and control local unions. Clearly Congress did not intend to require compliance in such instances where the parent organization bargained directly but not where it was indirectly engaged through the full support accorded an affiliated national or international union. The Board takes a contrary view, and as a result the parent is held sometimes subject and sometimes not, to the provisions of the statute. Compare *North Virginia Broadcasters, supra*, and *American Optical Co.*, 81 N. L. R. B., 453. The statutory terms may not be properly defined upon the basis of the capacity in which the labor organization acts in a particular instance.]

The Act contains its own definition of a "labor organization." Section 2(5) [29 U. S. C. A. No. 152(5)] provides: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." To determine that the C. I. O. does not come within the terms of the statute would require us to overlook the realities and substance of its objectives and operations. It is a matter of general knowledge that the parent organization does frequently materially support its affiliates by financial aid and otherwise in their efforts of collective bargaining. The Constitution of the Congress of Industrial Organizations (Articles II and III) declares that:

"The objects of the organization are:

"First. To bring about the effective organiza-

tion of the working man and woman of America regardless of race, creed, color or nationality, and to unite them for common action into labor unions for their mutual aid and protection.

"Second. To extend the benefits of collective bargaining and to secure for the workers means to establish peaceful relations with their employers, by forming labor unions capable of dealing with modern aggregates of industry and finance.

"Third. To maintain determined adherence to obligations and responsibilities under collective bargaining and wage agreements."

* * * * *

"Section 1. The Organization shall be composed of Affiliated national and international unions, organizing committees, local industrial unions and industrial councils."

* * * * *

"Section 3. Certificates of affiliation shall be issued to local industrial unions by the Executive Board. The Executive Board shall issue rules governing the conduct, activities, affairs, and the suspension and explusion of local industrial unions * * *."

The Supreme Court in *C. I. O. v. McAdory*, 325 U. S. 472, 475 (1945), stated that "Petitioners are the Congress of *Industrial Organizations, a national labor organization*, and certain affiliated labor organizations * * *." (Emphasis supplied.) Another example of similar judicial reference is found in *A. F. of L. v. Watson*, 327 U. S. 582, 586 (1946). See also, *United States v. C. I. O.*, 335 U. S. 106, and *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450.

The affidavit required by the provisions of No. 9(h), *supra*, is referred to in common parlance generally as the "non-communist affidavit." But it should be observed that the statute is not so restricted. Beyond the "Communist party" provision, it extends to require further sworn state-

ment, that the affiant "does not believe in, and is not a member or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any unconstitutional methods." Whether this provision might be also considered as a legislative construction of the beliefs of the members of the Communist party, is not pertinent here. The provision is pertinent though, as illustrative that No. 9(h) evidences no novelty in expression of congressional intent to prevent any governmental department from being used, directly or indirectly, to promote or sustain any organization or person who believes in the overthrow of the government of the United States by any unconstitutional means. For illustration, in the Act of June 28, 1941, making appropriations for the federal judiciary (together with other departments and brances therein specified) for the ensuing fiscal year (55 Stat. 265, 303, No. 504), and in similar Acts for each year thereafter,[2] Congress prohibited the use of any of the funds appropriated "to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the government of the United States by force or violence; provided that for the purposes hereof an affidavit shall be considered *prima facie* evidence that the person making the affidavit does not advocate, and is not a member of an organization that advocates the overthrow of the government of the United States by force or violence."[3] It is made a felony for any person within the prohibited classes to accept employment compensated from the appropriated funds. It is true that in application the similar provisions of the two Acts are not precisely analogous. One relates to those who are a part of the Government, and withholds the purse from those the statute defines. The other imposes a restric-

[2] 56 Stat. 468, 507, No. 504; 57 Stat. 230, 244, No. 302; 58 Stat. 334, 358, No. 301; 59 Stat. 169, 201, No. 601; 60 Stat. 466, 480, No. 501; 61 Stat. 279, 306, No. 501; 62 Stat. 305, 333, No. 501.

[3] It is a matter of common knowledge that in order to comply with the statutes the disbursing officers of the government sought the affidavits provided by the Act from each official and employee of the departments. We know that they were executed by District and Circuit Judges and it is a fair assumption by the Chief Justice and Justices of the Supreme Court as well.

tion upon an agency provided and maintained by the government, and directs that the benefits provided by the Act shall be withheld from those who do not comply. This difference in the status of those subject to and affected by the operation of the two enactments does not make inapt a comparison of the statutes since both clearly express the legislative purpose—indeed plain common sense—that the United States of America will not knowingly aid or nurture those pledged to its destruction.

Under the proper construction of the congressional language, the Congress of Industrial Organizations is a national labor organization within the terms of No. 9(h) of the Labor Management Relations Act, *supra*. It was stipulated in the hearing of this case that the requirement of the statute as we adjudge it, had not been met. The Board was therefore not empowered to issue the complaint against the respondent, and accordingly, there is no legal basis upon which to predicate the order now sought to be enforced. The order of the Board is therefore invalid, it may not be enforced, and should be set aside. It is so ordered.

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Fifth Circuit.

APPENDIX 4

EXCERPTS FROM BOARD'S DECISION AND ORDER

In the Matter of Isaac Andrews, Sarah Andrews, Mary E. Andrews, Martha W. Andrews, A. J. R. Helmus, and H. O. Coddington, d/b/a Andrews Company and American Federation of Labor, Case No. 10-CA-201, 87 N. L. R. B. No. 62.

* * * * *

1. The Respondent excepts to the Trial Examiner's finding that its refusal to bargain with the Union constituted a violation of Section 8(a)(5) of the Act. This exception is based upon the Union's failure to comply with the filing requirements of Section 9(f), (g), and (h) of the Act at the time of its request for recognition. Absent this element of non-compliance, we would, like our dissenting colleagues, affirm the Trial Examiner's finding of the 8(a)(5) violation.[1] However, under the circumstances of this case, and for the reasons hereinafter stated, we believe that the 8(a)(5) allegations in the complaint must be dismissed.

Congress enacted the National Labor Relations Act in 1935 with the expressed intent to prevent industrial strife and promote industrial peace. It gained that objective by creating rights and privileges for employees and labor organizations and thus restoring equality of bargaining power between employers and employees. Among the privileges so created was the right of a labor organization to be the exclusive bargaining representative. As a necessary corollary of that privilege, Section 8(5) of the Act imposed a duty on the employer to bargain with such ex-

[1] As set forth in the Intermediate Report, on October 13, 1947, the Union organizer addressed a letter to the Respondent, stating that the Respondent's employees had designated the Union as their exclusive representative and requesting that the Respondent recognize and bargain with the Union. The Union, although duly designated by a majority of the employees in an appropriate unit, was not then in compliance. The Respondent did not answer the letter, but embarked instead on what we all find was a campaign of unfair labor practices. On November 7, 1947, the Union effected full compliance, but did not renew its request for recognition. Three days later, the Respondent, without consulting the Union, unilaterally put into effect a new bonus plan.

clusive agent of its employees. The obligation so imposed being exclusive, it exacted a negative duty to treat with no other union.[2] Thus, under the Wagner Act, an employer was required to bargain and if he refused, he did so at his peril.

After 12 years of experience under the Wagner Act, Congress amended that statute. In order to eliminate "certain practices by some labor organizations, their officers, and members" which "have the intent or the necessary effect of burdening or obstructing commerce," Congress imposed certain limitations on the Board's administrative functions and also on the statutory rights or privileges of labor organizations which failed to satisfy the filing requirements set forth in the Act in Section 9(f), (g), and (h).

9(f) reads:

> * * * No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under Section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under sub-section (b) of section 10, unless * * *.[3]

9(g) reads:

> * * * No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless * * *.

Thus the Board, in dealing with a non-complying union, is forbidden to take the following steps: (a) it may not investigate a question concerning the representation of

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[2] *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 683; *NLRB v. Jones and Laughlin Corporation*, 301 U. S. 1, 44.

[3] Section 9(h), relating to filing affidavits, reads the same as Section 9(f) in this respect.

employees or certify the union as the statutory bargaining representative; (b) it may not entertain the organization's petition under Section 9(e)(1) for a union-shop election; and, finally, (c) it may not issue a complaint pursuant to a charge filed by the organization. Examination of this Section clearly shows that by its enactment, Congress was directing its legislative powers towards the rights and privileges of labor organizations as opposed to the rights and privileges of individual employees.[4] Section 9(f) was designed to curb undemocratic practices which existed in some labor organizations. By Section 9(h) Congress hoped to purge communists from the labor movement.[5] Unlike the Wagner Act, which gave unqualified protection to labor organizations, the Amended Act thus prescribes certain standards which Congress considered necessary in the public interest, peace, and welfare. To assert, as do our dissenting colleagues, that these standards should be met only when it becomes necessary for a labor organization to resort to the Board is, in our opinion, a perversion of legislative intent. While the Act's legislative history is not dispositive of legislative intent, we feel free to take judicial notice of the inherent threat that communism and other undemocratic doctrines and practices are to the labor movement in this country.

In the *Marshall and Bruce case;*[6] a majority of the Board stated:

> * * * We are convinced that Section 9(f), (g), and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also *embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing sections.*

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[4] See *Augusta Chemical Company,* 83 NLRB No. 7, wherein the Board said that employees who have engaged in union activity in behalf of a non-complying union are still protected by the Act.

[5] 93 Cong. Rec. A 1099, 1100, 3955, 5291, A 3232.

[6] *Marshall and Bruce Company, 75 NLRB 90.* (Members Houston and Murdock dissenting.)

We feel bound by that decision. In that case, we decided that the employer was not obligated to bargain with a non-complying union. Consistency demands the same result in this case. Furthermore, were we to find that the Respondent had violated Section 8(a)(5) when the union was not in compliance, we would be utilizing the Board's processes to give an aura of respectability to all unions which have failed to comply. We believe that such a result would not effectuate the purposes of the Act.

Apart from public policy, however, we believe that the Act itself dictates a dismissal of the 8(a)(5) charge in this case. The exclusive representative principle is a statutory right unknown at common law. While Congress has not specifically withdrawn that right from non-complying unions, it has withdrawn from non-complying unions the only method of enforcing the right by forbidding the Board to issue a complaint. Thus, while under the Wagner Act the remedy was unlimited, under the amended Act it is limited by the filing provisions. As we are here dealing with a statute which creates an obligation and at the same time creates a remedy, a limitation on the remedy is to be treated as a limitation on the right itself.[7]

Nor do we believe that the Union's subsequent compliance cured the effects of its non-compliance which existed at the time of its request to bargain. The Act does not state, nor may it be implied, that the Board should give retroactive effect to the Union's compliance. Such an interpretation would permit the circumvention of these provisions, for a non-complying labor organization could compel recognition by the mere threat of subsequent compliance and the filing of a charge. Moreover, we would be giving the noncomplying union the very remedy which Congress specifically denied it. Furthermore, the fundamental purpose of the Act is to encourage and protect the practice and procedure of collective bargaining. Labor organizations which fail to meet the filing requirements

[7] *The Harrisburg*, 110 U. S. 199; *Davis v. Mills*, 194 U. S. 451; *Western Fuel Company v. Garcia*, 257 U. S. 233; *Central Vermont R. v. White*, 238 U. S. 507; *Adams v. Albany*, 80 F. Supp. 876, 880.

remove themselves from the protection of the Act and thus weaken their bargaining position. We do not believe that Congress intended the Board to extend retroactive protection to those organizations, which have thus thwarted an established public policy.

Our dissenting colleagues concede that Congress, by Section 9(f), (g), and (h), deprived non-complying unions of access to the Act and the remedies therein provided; however, they ignore the action of Congress and would supply the remedy in this case because the Respondent did not contemporaneously specify non-compliance as the basis for its refusal to bargain. In other words, what Congress has specifically denied to a non-complying union, our dissenting colleagues would supply on the basis of a waiver by the employer. The short and complete answer is that a waiver can never supply the missing statutory requirements. The respondent's good or bad faith is as completely immaterial to the issue as in a case where the employer fails to specify lack of majority as the ground of its refusal to bargain with a union which in fact lacked a majority at that time. Would our dissenting colleagues consider such contemporaneous failure to specify lack of majority as tantamount to the existence of a majority? Obviously, not!

Accordingly, we find that the Respondent was not legally obligated to bargain with the Union while it was not in compliance with the provisions of Section 9(f), (g), and (h). Likewise, we find that the November 5 unilateral offer of a wage increase did not constitute a violation of Section 8(a)(5) as there was no exclusive representative then in existence which the Respondent was obligated to recognize.

PAUL M. HERZOG, CHAIRMAN, and JOHN M. HOUSTON, MEMBER, dissenting in part:

We join in the decision to the extent that it finds a violation of 8(a)(1) and (3). But we would find also that the Respondent unlawfully refused to bargain.

Our colleagues dismiss this portion of the case despite the fact that the union came into compliance within a month after the refusal to bargain and despite the fact that the Respondent, at the time it refused to bargain, *did not* assign as its excuse the non-compliance status of the union. Its refusal was based on a broad rejection of the collective bargaining principle. Indeed, it was not until it filed exceptions to the Intermediate Report in 1949, more than 16 months after its refusal to bargain, that the Respondent first raised the question of the Union's non-compliance status. Significantly, the Respondent dealt unilaterally with its employees on wages in November 1947, *after* the Union came into compliance, at a time when no excuse for evasion of its collective bargaining obligation existed.

In our view, the policy of Congress which Section 9(f), (g), and (h) was designed to effectuate could be better fulfilled by finding a refusal to bargain in such circumstances, absent a showing that a respondent in good faith refused to bargain *on the contemporaneously stated ground* that a union was not in compliance at the time. Such a result would protect employers legitimately seeking to act in furtherance of an important objective of the Act, by calling their employees' attention to the non-compliance status of their representative. It would furnish an incentive to employees to require their representatives to comply, because by so doing they could achieve immediate recognition and bargaining, if necessary with the assistance of Board processes which they could then invoke. It would deprive employers, such as the Respondent here, of a cloak behind which to commit unfair labor practices with impunity without troubling to inform their employees of

the non-compliance status of their representative. All these desirable objectives are aborted by our colleagues' decision today.

We believe that the requirements of Section 9(f), (g), and (h), that "no complaint shall issue" in behalf of a non-complying union, are clearly procedural and were so intended by the Congress. They deprive non-complying unions of a remedy; they do not provide employers who violate the Act with perpetual immunity.[9]

[9] The majority appears concerned that we are giving something to a union which has not complied with the filing requirements of the law. But all we would do is look, practically, at the situation to be remedied by our Order *now*. That amounts to ordering this employer to fulfill his obligation to bargain with a union which has met those requirements.

* * * * *

APPENDIX 5

STATUTES

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. Supp. I, Sections 141, et seq.

"Sec. 2. When used in this Act—

* * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"Sec. 3

* * *

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and

over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

* * *

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

"Sec. 9.

* * *

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recog-

nized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendation with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * *

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

"Sec. 10.

* * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof

upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation

of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the pro-

ceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

* * *

Sec. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"Sec. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at

which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

* * *

Sec. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.